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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

THOMAS E. HARPER and DIANE KEENE,
Individually and On Behalf of All Others
Similarly Situated,

Plaintiffs,

vs.

SMART TECHNOLOGIES INC., DAVID A.
MARTIN, NANCY L. KNOWLTON, G.A.
FITCH, SALIM NATHOO, ARVIND
SODHANI, INTEL CORPORATION, APAX
PARTNERS, MORGAN STANLEY & CO.
INC., DEUTSCHE BANK AG, and RBC
DOMINION SECURITIES INC,

Defendants.

) Case No. 11 CV 5232 (SBA)

) Assigned to: Hon. Sandra Brown Armstrong

) **RESPONSE TO PLAINTIFFS'**
) **STATEMENT OF RECENT DECISION IN**
) **FURTHER SUPPORT OF MOTION TO**
) **REMAND**

1 Defendants SMART Technologies Inc., Apax Partners, David A. Martin, Nancy L.
 2 Knowlton, G.A. Fitch, Salim Nathoo, Arvind Sodhani, Intel Corporation, Morgan Stanley & Co.
 3 LLC (f/k/a Morgan Stanley & Co. Inc.), Deutsche Bank AG, and RBC Dominion Securities Inc.
 4 respectfully submit this Response to Plaintiffs' Statement of Recent Decision in Further Support of
 5 Motion to Remand.

6 On March 13, 2012, Plaintiffs presented to this Court the recent decision in *Young v. Pacific*
 7 *Biosciences of California, Inc.*, No. 11 Civ. 05668 (N.D. Cal. Mar. 13, 2012), which granted a
 8 motion to remand a putative class action asserting solely federal claims under the Securities Act of
 9 1933 ("1933 Act"), notwithstanding the Securities Litigation Uniform Standards Act of 1998
 10 ("SLUSA")'s amendments to the 1933 Act's removal and jurisdictional provisions. The *Young*
 11 decision is incorrectly decided and, most important, does nothing to alter the conclusion that this
 12 Court can and should transfer this action to the Southern District of New York *without addressing*
 13 Plaintiffs' Motion to Remand.

14 Defendants' Motion to Transfer¹ and Plaintiffs' Motion to Remand address the same
 15 questions: (a) was this case properly filed and (b) what Court should make that determination. As
 16 discussed previously in detail, the case belongs in the Southern District of New York, in front of
 17 Judge Katherine B. Forrest, where *McKenna v. SMART Technologies Inc.*, 11 Civ. 7673, has long
 18 been pending. In *McKenna*, a case involving almost identical allegations and substantially similar
 19 parties, the court has already appointed the Lead Plaintiff pursuant to the Private Securities
 20 Litigation Reform Act of 1995, approved the Lead Plaintiff's choice of lead counsel, and, today,
 21 issued a decision following Defendants' motion to dismiss the complaint that has substantially
 22 narrowed the issues to be litigated. A copy of Judge Forrest's decision is annexed as Exhibit B to
 23 the accompanying Stern Declaration.

24 Plaintiffs' submission of the *Young* decision should not distract the Court from its ability (as
 25 established incontrovertibly by the Supreme Court and recent precedent in this Circuit²) to transfer

26 ¹ Defendants' motion is fully titled Defendants Motion to Transfer this Action or, in the alternative,
 27 to Dismiss or Stay this Action and Strike the Class Allegations. The complete papers for the parties'
 28 respective motions can be found at Docket Nos. 10 through 15 and 20 through 26.

² See discussion at Parts A.1 through A.3 of Defendants' Reply Brief in Support of their Motion to

1 this case to Judge Forrest so that she may address the question of remand and, ultimately, whether
 2 the case should be consolidated with the prior-filed *McKenna* action.

3 Even if the Court decides to address the propriety of remand prior to addressing transfer,
 4 however, the reasoning of the *Young* decision is unpersuasive in that it relied entirely upon district
 5 court decisions that Defendants have already demonstrated were erroneous in their analysis of the
 6 plain language and legislative history of SLUSA. (See Defendants' Opposition to Plaintiffs' Motion
 7 to Remand at Part IV.B (Docket No. 20).) The *Young* decision is further in error insofar as it relied
 8 upon *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031 (9th Cir. 2008), in which the
 9 Ninth Circuit found a putative class action not to be removable under the Class Action Fairness Act
 10 of 1995 ("CAFA"), as opposed to SLUSA.³ *Luther* did not address SLUSA because, unlike the
 11 instant action, it did not involve *covered* securities. In fact, in their Notice of Removal, Defendants
 12 explained that the *Luther* decision, if relevant at all, supported *Defendants'* position insofar as the
 13 *Luther* court implied that it would have found the action in question removable *had* SLUSA been
 14 implicated. (See Docket No. 1 at 4; *Luther* at 1033 n.1 (acknowledging the exception to the 1933
 15 Act's removal bar under Section 16(c), but explaining that it "does not apply because it is limited to
 16 cases involving 'covered securities' [and the] parties agree that the [securities at issue] are not of that
 17 type").) Plaintiffs, for their part, mention *Luther* only once in their remand briefing, asserting that
 18 *Luther* is entirely irrelevant to the instant action. (See Plaintiffs' Motion to Remand and
 19 Memorandum in Support Thereof at 10 n.4 ("In fact, the defendants in *Luther* removed the case only
 20 under [CAFA]. Therefore, the Ninth Circuit did not analyze the plain language or legislative history
 21 of SLUSA . . .").) Nowhere do Plaintiffs argue that *Luther* in any way supports their incorrect
 22 reading of SLUSA. That is because it does not.

23
 24
 25 Transfer (Docket No. 25) (citing, *inter alia*, *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549
 26 U.S. 422, 425 (2007); *Grubbs v. GE Credit Corp.*, 405 U.S. 699, 702-04 (1972); and *Rumohr v.*
Comerica Bank, 11 Civ. 1706, 2011 WL 2437415, *1 (N.D. Cal. June 17, 2011)).

27 ³ The court in *West Palm Beach Police Pension Fund v. CardioNet*, No. 10 Civ. 711, 2011 WL
 28 1099815 (S.D. Cal. Mar. 24, 2011), which the *Young* court found "persuasive," also improperly
 relied upon *Luther*.

1 Accordingly, the *Young* decision adds nothing new. The Court should grant Defendants'
2 motion to transfer and, if it determines to resolve Plaintiffs' motion to remand, should deny that
3 motion.

4
5 DATED: April 3, 2012

SIDLEY AUSTIN LLP

6 By: /s/ Andrew W. Stern
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7
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11 DATED: April 3, 2012

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15
16 DATED: April 3, 2012

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21 STANLEY & CO. INC.), DEUTSCHE BANK
AG, and RBC DOMINION SECURITIES INC.